

## § 1201.115

## 5 CFR Ch. II (1–15 Edition)

the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless it is new and material as defined in §1201.115(d) and the party submitting it shows that the evidence or argument was not readily available before the record closed.

(1) *Rejection for failure to comply.* The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission. Any deadlines affected by the rejection will be addressed in the rejection letter.

[77 FR 62368, Oct. 12, 2012, as amended at 78 FR 23458, Apr. 19, 2013]

### § 1201.115 Criteria for granting petition or cross petition for review.

The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact.

(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

[77 FR 62369, Oct. 12, 2012]

### § 1201.116 Compliance with orders for interim relief.

(a) *Certification of compliance.* If the appellant was the prevailing party in the initial decision and the decision granted the appellant interim relief, any petition or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(b) *Challenge to certification.* If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(c) *Allegation of noncompliance in petition or cross petition for review.* If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).